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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

CITY OF CLEBURNE, TEXAS, et al.,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

AMICUS CURIAE BRIEF FOR THE STATE OF TEXAS AND THE TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

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INTEREST OF AMICI

Recognizing the need and obligation to provide and promote certain specialized services and protections for Texas citizens who are mentally retarded, the State of Texas created the Texas Department of Mental Health and Mental Retardation (TDMHMR) amd authorized that agency to implement public policy pertaining to the mentally retarded. Texas Mental Health and Mental Retardation Act of 1965, TEX.REV.CIV.STAT. art. 5547-201 *et seq.* ("MHMR Act"), at art. 5547-202; Texas Mentally Retarded Persons Act of 1977, TEX.REV.CIV.STAT. art. 5547-300 ("MRPA"), at §§58-60. Under the MRPA, *Amicus* TDMHMR is "delegated the authority to carry out its responsibilities set forth in [that] Act." *Id.* at §58(b). The Attorney General of the State of Texas, who represents *Amicus* TDMHMR and the State of Texas herein, is authorized by the MRPA to bring an action in the name of the State to insure compliance with the Act and TDMHMR regulations thereunder. *Id.* at §65(a). As is more fully discussed in part II of the Argument below, the public policy of the State of Texas concerning its mentally retarded citizens gives the State and its agency TDMHMR a vital interest in the outcome of the case now before this Court. That public policy mandates a preference for (1) normalized community-based living alternatives for the mentally retarded, (2) made available through a pluralistic approach involving State, local, and private providers. Any decision which has the effect of permitting a local governmental entity such as Petitioner City of Cleburne (hereinafter, usually "the City") to exercise its zoning powers so as to exclude State-authorized group homes from normal residential neighborhoods will serve to undermine both facets of this Texas public policy.

Consequently, on behalf of the State of Texas, TDMHMR now appears, through the Attorney General of Texas, as *amicus curiae*, to explain the policy interest of the State, as it bears on "rational basis" scrutiny of the contested City ordinance.

STATEMENT OF THE CASE

In July of 1980, Plaintiff Cleburne Living Center, a private corporation devoted to the provision of community-based

residential services to mentally retarded persons, obtained a house at 201 Featherston Street in Cleburne, Texas, as a site for a supervised group home. The home was to be operated as a "Level I Intermediate Care Facility for the Mentally Retarded" (ICF/MR), in accordance with state and federal regulations. The house was inspected and approved for the intended use by the appropriate State authorities. However, Plaintiffs Hannah (the property owner) and CLC were instructed by City of Cleburne officials to seek a "special use permit" before they could operate the group home. Section 8 of the City's zoning ordinance permits property in the zone encompassing 201 Featherston Street to be used for, *inter alia*, apartment houses, "multiple dwellings," board and lodging houses, fraternity or sorority houses or dormitories, "philanthropic or eleemosynary institutions," and "hospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the* insane or *feeble-minded* or alcoholics or drug addicts." (J.A. 61-62, 90, Finding of Fact 12, emphasis added). Section 16, subdivision 9 of the ordinanace requires "special use permits" for "hospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions," wherever such facilities might be located in the City. (J.A. 63). (The responsible City staff member acknowledged that a boarding home for paroled felons or delinquent youth might be a permitted use. Tr. 76-277.) If the intended group home herein had been the same in all other respects except that its potential occupants were not mentally retarded, it would constitute a permitted use under the City's zoning ordinance. (J.A. 93, Finding of Fact no. 24).

In August of 1980, the City's Planning and Zoning Commission recommended denial of the special use permit, which the City Council did in October. The primary basis for the denial was the mental retardation of the intended residents of the group home. (J.A. 94, Finding of Fact no. 20). In November of 1980, Plaintiffs Cleburne Living Center (now named Community Living Concepts), Jan Hannah (the owner of the 201 Featherston Street property), Johnson County Association for Retarded Citizens, and Advocacy, Inc. (the Texas "protection and advocacy system" established pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6012) filed suit in U.S. District Court against the City and certain of its officials. After a bench trial, Judge Robert Porter

entered judgment on October 4, 1982, along with an unpublished memorandum opinion, denying relief in all respects. The U.S. Court of Appeals for the Fifth Circuit reversed that decision on March 5, 1984, holding that mentally retarded persons are a "quasi-suspect class," so that under "heightened scrutiny," the City ordinance and the City's denial of a special use permit thereunder denied equal protection. 726 F.2d 191 (5th Cir. 1984). On July 6, 1984, the Court of Appeals *en banc* denied rehearing, 735 F.2d 832, whereupon this Court granted *certiorari* on November 13, 1984.

SUMMARY OF ARGUMENT

The public policy of the State of Texas encourages the establishment of group homes for the mentally retarded in normal residential neighborhoods. Given this policy, it is in the State's interest that private entrepreneurs have an incentive to assume the risks and start-up costs of creating such residential alternatives, so that the State and local community MHMR centers do not carry the entire fiscal burden. The exercise of local zoning powers to exclude such privately operated (but State regulated and jointly State and federally financed) group homes from normal residential neighborhoods frustrates State public policy.

To preserve the equal protection remedy fashioned below, which is congruent with State policy and State interests, it is not necessary for this Court to reach the question of whether the mentally retarded constitute a "quasi-suspect class" requiring "heightened scrutiny." Even under the more lenient "rational basis test," the challenged City ordinance must fall. The discriminatory distinction which that ordinance creates, between group homes for the mentally retarded and multiple-occupant residential facilities for the non-retarded, including facilities for other special needs populations (such as elderly nursing home residents and tubercular sanitarium patients), does not rationally advance any valid governmental objective which, under Texas law, a municipality may serve through its zoning powers. Zoning powers are delegated to the City from the State and may not serve any end not assigned by State law as a purpose of zoning. Thus, the City is precluded, as a matter of State law, from arguing that the ordinance's discrim-

inatory classification scheme is "rationally related" to differences in the service needs of the mentally retarded as compared to those of other special needs populations permitted to reside in the neighborhood in question. The authority and responsibility to determine how the unique service needs of the mentally retarded affect their need and ability to live in community-based group homes is expressly granted to *Amicus* TDMHMR and not to local zoning authorities. The purposes which the City is authorized by State law to promote through its zoning function concern the health, welfare, safety, and morals of the public — more particularly, the adjoining property owners in the use and enjoyment of their property. The City has never identified any adverse impact on the surrounding property that rationally could serve to distinguish the mentally retarded from aged nursing care patients, sanitarium or other permitted hospital clientele, or other permitted residents. Consequently, the lower opinion should be affirmed, but on the more narrow grounds proposed herein.

ARGUMENT AND AUTHORITY

I. Introduction: The Court Need Not Decide Whether the Mentally Retarded are a "Quasi-Suspect Class."

To find the challenged City zoning ordinance herein constitutionally infirm as a violation of equal protection, it is not necessary for this Court to reach the question of whether the mentally retarded constitute a "quasi-suspect class" so as to invoke heightened scrutiny. It is the position of the State of Texas that, on the facts of this case, the City's exclusionary zoning cannot withstand the more lenient scrutiny under the "rational basis test." Consequently, as a matter of judicial economy and restraint, the Court should allow the result below to stand, but on the more narrow grounds that the contested City zoning ordinance does not rationally serve any valid governmental purpose. See *Zobel v. Williams*, 457 U.S. 55 (1982) at 60-61 ("if the statutory scheme cannot pass even the minimal test..., we need not decide whether enhanced scrutiny is called for").

II. The City Zoning Ordinance and Application Thereof in this Case Run Counter to the Public Policy of Texas.

A. The public policy of Texas favors group homes for the mentally retarded in normal residential neighborhoods.

The legitimacy of any purposes asserted by the City, a subdivision of the State, for excluding a group home for the mentally retarded from a residential neighborhood should be analyzed in the context of the public policy of Texas. That policy clearly favors community residential facilities, such as group homes, which enhance the mentally retarded citizen's ability to live and function productively and independently in society. The Texas Legislature has announced the purpose of the 1965 MHMR Act, *supra*, to be "to provide, coordinate, develop, and improve services for the mentally retarded persons of this state to the end that they will be afforded the opportunity to develop their respective mental capacities to the fullest practicable extent and to live as useful and productive lives as possible." *Id.* at art. 5547-201 §1.01(a). In furtherance of that goal, the Act declares that "it is the policy of this state that when appropriate and feasible, ... mentally retarded persons shall be afforded treatment in their own communties." *Id.* at §1.01(c). The statute then delegates to the State Commissioner of Mental Health and Mental Retardation (not to local city councils in the exercise of their zoning powers) the authority to "determine for persons exhibiting the various forms of mental disability the types of services for the mentally disabled that can be most economically and effectively delivered at the community level ..." *Id.* at §2.12A(a). TDMHMR is given the power and duty to "designate the facility in which any mentally retarded person under its jurisdiction is placed ..." *Id.* at §2.19.

The 1977 MRPA, *supra*, reinforces the State's commitment to community living opportunities for the mentally retarded, by guaranteeing the following rights:

> SUBCHAPTER C. BASIC BILL OF RIGHTS
>
> Purpose
>
> Sec. 4. The purpose of this subchapter is to recognize and protect the individual dignity and worth of mentally retarded persons.
>
> * * * *

Right to least restrictive living environment
Sec. 7. Every mentally retarded person shall have the right to live in the least restrictive setting appropriate to his individual needs and abilities. This includes the person's right to live in a variety of living situations, such as the right to live alone, *in a group home*, with a family, and in a supervised, protective environment.

* * * *

Right to equal housing opportunities
Sec. 10. No owner, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent, or lease any real property, or agency or employee of any of these shall refuse to sell, rent, or lease to any person or group of persons solely on the basis of mental retardation.

* * * *

Right to treatment and habilitative services
Sec. 11. Every mentally retarded person shall have the right to receive adequate treatment and habilitative services for mental retardation suited to the person's individual needs *to maximize the person's capabilities and enhance the peron's ability to cope with his environment.*[1] Such treatment and habilitative services shall be administered skillfully, safely, and humanely with full respect for the dignity and personal integrity of the person.

* * * *

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1. Evidence introduced by Plaintiff's (Respondents herein) at trial and reflected in the District Court's findings shows that for many mentally retarded persons, community living arrangements, such as group homes, are essential for maximizing the person's capabilities and enhancing the person's ability to cope with his environment.

SUBCHAPTER D.
ADDITIONAL RIGHTS OF CLIENTS[2]

Additional rights

Sec. 14. In addition to the rights guaranteed in Subchapter C of this Act, clients shall have the rights enumerated in this subchapter.

* * * *

Right to least restrictive alternative

Section 15. Each client shall have the right to live in the least restrictive habilitation setting appropriate to the individual's needs and be treated and served in the least intrusive manner appropriate to the individual's needs.

* * * *

SUBCHAPTER E.
ADDITIONAL RIGHTS OF RESIDENTS[3]

* * * *

Sec. 25. Residents shall also have the ... right to a normalized residential environment ...

MRPA, *supra* (emphasis added). TDMHMR is instructed to "promulgate rules and regulations to ensure the implementation of the rights guaranteed in Subchapters C, D, and E of this Act." *Id.* at §26. The Texas legislature has forcefully stated the public policy which underpins the rights above, in the Act's declaration of purpose:

> (a) It is the public policy of the state that mentally retarded persons should have the opportunity to develop to the fullest extent possible their potential for becoming productive members of society...

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2. The MRPA defines a "client" as "a person receiving mental retardation services from [TDMHMR] or [a local] community center [created by the MHMR Act]." MRPA, *supra*, at §3(12).

3. The MRPA defines a "resident" as "a person living in and receiving services from a residential care facility of [TDMHMR] or a community [MHMR] center." *Id.* at §3(13).

> (b) The legislature recognizes that the preservation and promotion of home-living situations where feasible is desirable. When home-living situations are not possible and placement in a residential facility for mentally retarded persons is necessary, the legislature declares that those persons must be admitted ... to a facility ... which fosters the personal development of the resident and enhances the person's ability to cope with the environment.
>
> (c) *Recognizing that persons have been denied rights solely on the basis of mental retardation,* the legislature seeks to educate the general public to the fact that mentally retarded persons who have not been adjudicated incompetent and for whom a guardian has not been appointed by a due process proceeding in a court of law have the same rights and responsibilities enjoyed by all citizens of Texas. *The legislature urges all citizens to assist mentally retarded persons in acquiring and maintaining their rights and in participating in community life as fully as possible.*

MRPA, *supra*, at §2 (emphasis added). The responsiblity for implementing the foregoing public policy rests with *Amicus* TDMHMR. The Texas Board of MHMR is charged with "formulat[ing] the basic and general policies, consistent with the purposes, policies, principles, and standards stated in [the MHMR] Act, to guide the Department in administering this Act." MHMR Act, *supra*, at §2.11(a). Pursuant to that authority, the Board over the years has promulgated policies to promote the right of mentally retarded citizens to live in community-based residential facilities. Among the most recent statements of this policy are the following. A February 24, 1984, Mission Statement declares:

> The Department shall assure that ... mentally retarded individuals .. are afforded treatment in their own home communities whenever appropriate and feasible. Toward this end the Department shall emphasize those services for mentally ill and mentally retarded persons which are effective alternatives to treatment in large residential facilities.

Pursuant to that mission, the Board adopted the following goals:

> *GOAL #2: CONTAINMENT*
> The Department shall increase to the extent appropriate and feasible the number of mentally ill and mentally retarded children and adults who leave state facilities to return to their own communities, and shall reduce to the extent appropriate and feasible the number of mentally ill and mentally retarded children and adults who leave their own communities to be served elsewhere.
>
> *GOAL #3: COMMUNITY ALTERNATIVES*
> The Department shall place primary emphasis on developing and maintaining in communities those specific services for mentally ill and mentally retarded children and adults which have been demonstrated by scientific research to be effective alternatives to care and treatment in large residential facilities.
>
> Sub-goal 3.4: The Department shall develop and maintain an array of residential alternatives in communities to provide living environments for mentally ill and mentally retarded persons suitable to their individual needs and abilities.

As recently as December 7, 1984, the Board reaffirmed its commitment to these goals by delaring:

> Individuals with mental retardation shall receive services in their own local communities whenever appropriate and feasible. ... Therefore, the Board, through its budget-approval and policy-making roles, shall endeavor to support with adequate resources the ... development of an expanded range of alternative programs in the communities of Texas. [S]uch expansion of the range of community services is essential to provide a balanced and effective delivery system for mentally retarded persons ... Therefore, the Board reaffirms

> its policy to continue ... to expand the range of community alternatives available to people with mental retardation.
>
> * * * *
>
> In accordance with these policies and in furtherance of previously approved policies of this Board, the Commissioner is authorized and directed as follows:
>
> * * * *
>
> B. To identify legal, programmatic, financial and attitudinal barriers to community residential services and to take all reasonable steps to eliminate such barriers.

The foregoing policy is furhter reinforced in commitments made on behalf of the State and TDMHMR in the settlement of a ten-year class action lawsuit against three TDMHMR state schools (institutions) for the mentally retarded. *Lelsz v. Kavanagh*, C.A. No. S-74-95-CA (E.D. Tex., order and memorandum opinion July 19, 1983). As part of the *Lelsz v. Kavanagh* Settlement Agreement, the State of Texas and TDMHMR committed themselves to "use their best efforts to overcome all obstacles and barriers to the creation of facilities and programs for habilitation outside the institution." *Lelsz v. Kavanagh*, supra, slip op. at 10.

B. The public policy of Texas favors the provision of community living alternatives for the mentally retarded through a pluralistic combination of state, local public, and private services.

For TDMHMR to fulfill its State mandate to ensure that eligible mentally retarded persons are provided community residential placement, such living alternatives must in fact be available. State law and public policy envision the delivery of community residential services to the mentally retarded by a variety of providers. First, TDMHMR is authorized to establish and directly administer community-based residential facilities for the mentally retarded, as alternatives to large State institutions. MHMR Act, *supra*, at art. 5547-202 §2.17(a). Second, the Legislature has authorized the creation of community MHMR

centers by local governmental bodies. *Id.* at art. 5547-203. "It is the policy of this state that community centers strive to develop services for the ... mentally retarded that are effective alternatives to treatment in large residential facilities." *Id.* at §3.01A.

Finally, State public policy encourages the creation of community residential alternatives by private service providers. The federal "Medicaid" statute (Title XIX of the Social Security Act) offers states an optional program whereby public and private "intermediate care facilities for the mentally retarded" (ICF/MRs) can receive federal (matched by State) reimbursement for residential services to mentally retarded clients. 42 U.S.C §1396d(a)(15). Texas has chosen to participate in this program. TEX.HUM.RES.CODE §32.001 *et seq.* ICF/MR funding has become the primary source of inducement for private providers (both profit and non-profit) to establish group homes for the mentally retarded in normal residential neighborhoods in Texas.[4] Plaintiff/Respondent Cleburne Living Center (now Community Living Concepts) sought to operate a private ICF/MR in Cleburne, Texas. Various facets of the operation of a private community- based ICF/MR are regulated by the Texas Departments of Health, of MHMR, and of Human Resources, respectively. 25 Tex.Adm.Code §§145.211-145.244, 405.531-405.540; 40 T.A.C. §27.1-27.9807. The State regards it as in its interests to have private entrepreneurs assume the risks and start-up costs of at least a portion of the many group homes that must be established throughout Texas, so that TDMHMR and local community centers do not have to shoulder the entire burden and so that a variety of approaches can be attempted. In its statement of purpose, the MRPA declares: "The responsibility placed upon the state [by this Act] shall not in any way replace or impede parental rights and responsibilities or terminate the activities of those persons, groups, and associations that advocate for and assist mentally retarded persons." MRPA, *supra*, at §2(a).

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4. Consequently, the 1981 appropriations act expresses "the intent of the Legislature that the Department of Mental Health and Mental Retardation ... maximize the use of Title XIX federal funds [to] accomplish the duties of [TDMHMR]," including "programs for Intermediate Care for Mentally Retarded." 1981 Tex. Gen. Laws at 3593.

III. The Disparity of Treatment Between Group Homes for the Mentally Retarded and Facilities for Other Special Needs Populations does not Rationally Serve any Valid Governmental Objective Which the City may Pursue Through its Zoning Powers.

When a statute which serves to exclude or disadvantage one class vis-a-vis others is subjected to "minimal scrutiny" under the equal protection clause of the Fourteenth Amendment, the distinction created by the statute must promote some valid governmental purpose in order to withstand constitutional attack. See *Schweiker v. Wilson*, 450 U.S. 221 (1981) at 235 (the disparity must "rationally advanc[e] a reasonable and identifiable governmental objective"); *Zobel v. Williams, supra*, at 62 (defendant "has shown no valid state interests which are rationally served"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) at 438-442 (concurring opinion). To determine whether the contested City ordinance herein rationally serves or advances a valid, reasonable, and identifiable governmental objective, it is necessary first to ascertain what purposes the City legitimately may pursue through its zoning powers. The City is a political subdivision of the State and derives its authority from State law. TEX. CONST. art. XI §§4-5; TEX.REV.CIV.STAT. arts. 961 *et seq.*, 1133 *et seq.*, 1175 *et seq.* The State has chosen to delegate to the City the *function* of zoning. TEX.REV.CIV.STAT. art. 1011a; *Smart v. Lloyd*, 370 S.W.2d 245 (Tex.Civ.App.—Texarkana 1963, no writ) at 248 ("The power of the City to zone is that delegated to it by the State"). However, the *purposes* to be served by the exercise of the zoning function are still subject to definition and delimitation by State law and policy.[5] It follows that the City is restricted in

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5. "Texas courts have invariably interpreted section 5 [of TEX. CONST. art XI] to mean that a municipality may not prohibit any activity sanctioned by state law. Texas case law defines both sanction and prohibition broadly. An activity is sanctioned by state law if it is regulated, taxed, licensed, or otherwise directly addressed, but not expressly prohibited, by state legislation." *Aladdin's Castle, Inc. v. City of Mesquite*, 701 F.2d 524 (5th Cir. 1983) at 529-530 (citations omitted), following remand from this Court, 455 U.S. 283 (1982). See also *Swain v. Board of Adjustment*, 433 S.W.2d 727 (Tex.Civ.App. — Dallas 1968) at 731 ("The City ... is confined in its exercise of power to pass a comprehensive zoning ordinance to the express authority granted it by the legislature"), *cert. den.* 396 U.S. 277 (1970).

the purposes it may claim to be serving by its exclusionary zoning. Thus any governmental purpose preempted by the State, or not delegated to the City, could not be a "valid governmental objective" which the City could purport to further by its discriminatory classification. *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) at 116-177, in which this Court invalidated a discriminatory U.S. Civil Service Commission rule in part because the purposes advanced to justify the rule were not within the purview of the Commission but were the province of other agencies or branches of the government.

The challenged City zoning ordinance allows specialized facilities for certain special needs populations to be established in the neighborhood in question without prior City approval. These include nursing homes for the elderly, homes for delinquent youth, and even perhaps homes for paroled felons. See Statement of the Case, *supra*. However, a group home for the mentally retarded must seek a special use permit, with the very real prospect of denial (as this case shows). To survive "minimum scrutiny" for equal protection purposes, the City's discrimination between the mentally retarded and other special needs populations must rationally advance some valid governmental objective which the State has permitted the City to serve through zoning. The dissent to the denial of *en banc* review below suggested certain differences between the mentally retarded and other special needs populations which might constitute a rational basis for the discriminatory treatment:

> And, in respect to the appropriate living, caring, and educational environment, the general subject under consideration here, the retarded are meaningfully different not only from nonretarded generally but also from other groups for which special arrangements in these respects are often made: the very young, the very old, the mentally or physically ill.

735 F.2d at 833. However, the City is precluded from defending its exlcusionary zoning as rationally related to the foregoing differences. The determination as to the impact of such differences on the ability of mentally retarded persons to live in a group home in a normal residential neighborhood is not a valid function of the City through its delegated zoning powers. As

the discussion in part II above makes clear, that determination lies within the exclusive province of TDMHMR and other State agencies such as Health and DHR.

The authority to exercise zoning functions is delegated by the State to the City for "the purpose of promoting health, safety, morals, and for the protection and preservation of places and areas of historical, cultural, or architectural importance and significance, or the general welfare of the community."[6] TEX. REV.CIV.STAT. art 1011a. Texas courts have interpreted the "health, safety, morals, and ... general welfare of the community" language to mean that: "The basic purpose in all restrictive zoning ordinances is to prevent one property owner from devoting his property to a use which would be *unduly imposed* on the adjoining landowners *in the use and enjoyment of their property.*" Wallace v. Daniel, 409 S.W.2d 184 (Tex.Civ.App. — Tyler 1966, writ ref. n.r.e.) at 189 (emphasis added). Consequently, the disparity between the City's treatment of group homes for the mentally retarded and residential facilities for other special needs populations cannot be premised on differences in the living, care, and educational needs of the mentally retarded. (Indeed, the City ordinance itself does not purport to be concerned with regulating the internal operation or "program" of residential facilities, but only with the impact of each type of property use on the surrounding communi-

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6. Texas law in this respect is in line with this Court's doctrine regarding the proper role and purpose of local zoning powers. The Texas rule, that a "zoning ordinance must bear a substantial relation to the public health, safety, morals, or general welfare," *Coffee City v. Thompson*, 525 S.W.2d 758 (Tex.Civ.App. — Tyler 1976, writ ref. n.r.e.) at 767, tracks the language of this Court's holding in *Euclid v. Ambler Co.*, 272 U.S. 365 (1926) at 395, the seminal decision on zoning. While that decision permits broad discretion by local zoning authorities to regulate private property, the Court declared: "It is not meant by this, however, to exclude the possibiliy of cases where the general public interest would so outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 390. In *Euclid*, this Court reversed a broad injunction against an entire zoning ordinance, without "scrutiniz[ing] its provisions ... to ascertain ... whether there may be ... provisions ... which, if attacked separately, might not withstand constitutional scrutiny." *Id.* at 395. The majority acknowledge "that when .. the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises ... or to particular conditions, ... some of them, or even many of them, may be found to be clearly arbitrary and unreasonable." *Id.*

ty. See J.A. 50.) Rather, the City must come forward with some difference in the adverse impact of group homes for the mentally retarded — as compared to the impact of nursing homes for the aged, tuberculosis sanitariums, halfway houses for youthful offenders, etc. — on the health, safety, morals and general welfare of the community.

Had the City made any effort to articulate a rational relationship between its discriminatory ordinance and a valid governmental purpose of zoning, that rationale still would have to be considered in the context of State public policy. That policy reflects the conclusion that it is in the public interest to encourage group homes for the mentally retarded in normal residential neighborhoods. Thus, as a matter of law, a discriminatory municipal ordinance cannot be found to rationally serve a State interest when that ordinance runs counter to State public policy and declared State interests. See *Zobel v. Williams, supra.*

At trial, the City offered no justification for the disparate treatment by the ordinance on its face and the District Court found none. The justifications offered were only for the denial of a special use permit — not for the requirement that group homes for the mentally retarded seek such a permit while comparable specialized facilities for the non-retarded are not so burdened. (J.A. 95, 103, Finding of Fact no. 34, Conclusion of Law no. 2). The District Court identified seven factors considered by the City.[7] (J.A. 95). Nevertheless, the overriding

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7. A red herrring issue raised by the City concerned a new rule by the Texas Department of Human Resources limiting the size of subsequently approved private ICF/MRs to six beds each. The proposed ICF/MR group home in this case would contain thirteen beds. Plaintiffs argued that the "six bed rule" was fiscal rather than qualitative and would not apply to the previously approved Cleburne Living Center. The Record supports the Plaintiffs on this point. The undersigned counsel for *Amici* has consulted the appropriate State officials and can inform this Court that the "six bed rule" would not pose an obstacle to the proposed Featherston Street group home at issue in this case. However, of more importance to the legal issues herein, it would not matter if the TDHR rule were to the effect claimed by the City. The very existence of the "six bed rule" only serves to emphasize the point that questions such as how large a group home for the mentally retarded should be are matters for the judgment of State regulators and not the Cleburne City

(Footnote continued on next page)

"but for" factor which motivated the denial of a special use permit was found to be the mental retardation of potential residents of the group home. (J.A. 94, Finding of Fact no. 29). However, without a rational basis, in terms of valid zoning purposes, for distinguishing between residential facilities for the "feeble minded" and those for other special needs populations, the City never should have been in a position to grant or deny a special use permit to the Cleburne Living Center.

CONCLUSION

In view of all the foregoing, *Amici* State of Texas and TDMHMR urge this Court to affirm the decision below, but on the more narrow ground that the challenged City ordinances does not rationally promote any valid governmental objective which the City is pemitted by State law to pursue through its zoning powers.

Respectfully submitted,

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(footnote continued from previous page)
Council. If, however those State officials should choose to permit the operation of the group home, the City has no authority, *based on the service needs of the mentally retarded,* to second guess the discretionary judgment through its zoning powers. Rather, the City must come forward with some rational basis to believe that thirteen mentally retarded group home residents pose a greater threat to the health, welfare, safety, and morals of the community — i.e., constitute a greater imposition on the adjoining residents' use and enjoyment of their property — than thirteen nursing home residents, paroled felons, tubercular patients, etc.

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